Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 282.

NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY

vs.

THE STATE OF MISSISSIPPI.

GAYLORD B. CLARK,
THOS. L. BAYNE,
For Defendant in Error.

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When we filed our briefs we had not seen those of complainant, and, therefore, respectfully present a short supplement.

An inspection of the map which is attached to the brief filed by defendant in error in this case in March, 1880, will show that the principal outlet of Pearl river is through the Rigolets, in Lake Borgne; on the east we have East Pearl river, and on the west, West Pearl, which latter empties into Lake Ponchartrain; East Pearl river, through its principal mouth or channel joins the central stream just before it reaches the Rigolets, and there, through one common channel, empties into Lake Borgne, and over this the railroad company has constructed a drawbridge with space of a hundred feet. It has another mouth or channel further east, and over this mouth or channel is the bridge in controversy. It is conceded that the bridge over Pearl river at the Rigolets has a draw exceeding sixty feet, and conforms to all the requirements of the charter of the railroad company, and act of

Congress, and it is shown by the pleadings that this is the channel through which the principal traffic and business of Pearl river is conducted. (Answer p. .) The Rigolets and all the passes, bayous, and outlets west of the eastern mouth of what is called East Pearl river are in Louisiana, and one half of the eastern pass is in that state.

The sixth sub-section of article two of the act of Mississippi of February 7th, 1867, contains a grant of full authority to maintain its railroad over all water-courses, bays, inlets, and rivers in the State in its course, by bridges, subject to two provisos—one relating to Pearl river as follows: "*Provided,* That in the central portion of the channel of the Pearl river, the Bay St. Louis, of the Bay Biloxi, and of the East Pascagoula river, and each of them, shall construct and maintain a draw-bridge which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width. * * * *Provided, however, That in case the company shall locate the line of their road across the channel of the Rigolet at a point south of (or below) the principal entrance into the Rigolet, then the said company shall not be required to construct a draw-bridge across any bayou leading into Pearl river, or across any small pass or mouth of said river.*" It is also provided that such part of this section as relates to Pearl river, if the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to and authorized the same, or said company have built such a bridge across said Pearl river for its railroad as shall be in accordance with this section, and also with any authority or power granted to said company by the State of Louisiana in the premises, and said draw-bridge may be built in the centre of the channel of said Pearl river, or in that portion of the same within the territory of the State of Louisiana or of this State as most convenient for public use.

The answer, which is conceded to be true, shows that there

was and is "no navigable opening, pass, or mouth of said Pearl river which is or could be crossed by the said railroad and bridge, excepting the mouth of said river, which is known and designated as East Pearl river." The proviso would be absolutely without meaning if it did not apply to this. The proviso is part of the same section and specifically says that the railroad company is to be dispensed from building the bridge mentioned if there is a draw of sixty feet made in the bridge at the Rigolets, and the Legislature of Louisiana consents to and authorizes this.

As said in the case of Savings Bank vs. The United States, 19 Wal. R., 227 (on 235—236). A proviso takes out of the operation of the body of the enactments that which otherwise would be within it. A proviso restrains the generality of previous provisions.

The State of Louisiana assented, and "*Provided, however,* That in the channel of the Great Rigolet, or in the channel of that part of Lake Ponchartrain hereinbefore named, there shall be constructed and maintained by said company a drawbridge which, when opened, shall give a clear space for the passage of vessels of not less than one hundred feet in width; *and in the channel of the Pearl river the said company shall construct a drawbridge of not less than sixty feet in width, except in case the company shall locate their road across the Great Rigolet at a point south of (or below) the principal entrance of Pearl river into the Great Rigolet, then the company shall only be required to construct one drawbridge, which shall be in the channel of the Great Rigolet, as hereinbefore named.*" (The italics are ours.)

An examination of such portions of the acts of the Legislature of Mississippi and Louisiana as relate to this subject will show that they are almost identical in language. They were probably prepared at the same time and by the same hand.

The bridges were immediately constructed under these acts of the Legislatures of Mississippi, Louisiana, and Ala-

bama, and in accordance with them. The answer shows that the railroad was completed and in operation in 1869. The principal bridge was constructed at the Great Rigolets, "south of and below the principal entrance of Pearl river into the Rigolet." Such traffic as had been carried on in Pearl river continued, and now continues, through the principal mouth of that river, which emptied into Lake Borgne at the Great Rigolets. No objection was made, no intimation was given, that the bridges were not constructed in strict conformity with the charter of the railroad. In March, 1868, Congress passed an act declaring "that the New Orleans, Mobile, and Chattanooga Railroad Company is hereby authorized and empowered to construct, build, and maintain bridges over navigable waters of the United States on the route of said railroad between New Orleans and Mobile, for the use of said company and the passage of its engines, cars, trains of cars, passengers, mails, and merchandise thereon; and said railroad and its bridges aforesaid, when constructed, completed, and in use in accordance with this act and the laws of the several States through whose territory the same shall pass, shall be deemed, recognized, and known as lawful structures and a post road, and are hereby declared as such: *Provided, however*, That the said company, in the construction of its bridges over and across the waters known as East Pascagoula river, the Bay of Biloxi, the Bay of Saint Louis, and the Great Rigolet, shall construct and maintain drawbridges in the channels thereof, which, when open, shall give a clear space for the passage of vessels, of not less than eighty feet, in the channels of East Pascagoula river, and of the Bay of Biloxi, and of the Bay of Saint Louis, and of not less than one hundred feet in the channel of the Great Rigolet."

These acts of the several Legislatures of Mississippi and Louisiana and of Congress, whether taken singly or all together, show clearly what bridges were to be constructed and how they were to be constructed; and contemporaneous with these enactments the construction of the road and its bridges

was in actual progress. From 1869 until June, 1875—for six years and more—the railroad was in operation and its bridges constructed. Then the district attorney of Hancock county commenced the proceedings which are now before the court. It is certainly true that the railroad company did its work and expended its money immediately after the passage of the acts of the Legislatures of Mississippi and Louisiana, in accordance with the accepted construction of those acts by the legislators who enacted them, and in accordance with the views of all the people along the line of the railroad. There was no complaint nor suggestion of variance, nor does complaint come now from any other quarter than such as is evinced by these proceedings. The cotemporaneous construction of these acts by all parties in interest immediately after their passage when the subject was fresh in the minds of all, and certainly constituted a leading subject of interest and discussion among all of the people in the countries where the road was located. The construction thus given and acted upon—thus accepted unchallenged for so long a period of time—will not now be disturbed unless it shall be demonstrated to be at variance with the law. That construction, we respectfully submit, is correct.

"Usage cannot alter the law, but is evidence of the construction given to it."

United States *v.* McDaniel, 7 Peters, 15.

"In the construction of a doubtful and ambiguous law the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

Edward Lessee *v.* Darby, 12 Wheaton, 210.

Says this court, in Aldridge *vs.* Williams, in speaking of the construction of statute, "we must gather their" (the legislatures) "intention from the language there used, comparing it, if any ambiguity exists, with the laws upon the same

subject, and looking, if necessary, to the public history of the times in which it was passed."

The proviso in the act of the Mississippi Legislature shows that special attention was given to this subject—"that in case the company shall locate the line of their road across the channel of the Rigolet at a point south of or below the principal entrance of Pearl river into the Rigolet, then the said company shall not be required to construct a drawbridge across any bayou leading into Pearl river or across any small pass or mouth of said river." This "principal entrance of Pearl river into the Rigolet" was within the limits of the State of Louisiana, and this caused the Legislature to provide that the State of Louisiana should consent and authorize the construction of this bridge there; and if the State of Louisiana did not consent and authorize, then such a bridge was to be built as was otherwise provided for. Then the alternative "or" in the proviso would have effect.

The State of Louisiana did consent and authorize such a bridge as was required, Congress then specially described the bridge, which was to be constructed at this place and made no mention of any other bridge over Pearl river or its branches; the bridge was immediately built and put into use under this law of Congress as therein provided, and as stated no suggestion was made for six years or more that the constructions did not accord with the acts of the legislature.

The railroad has become a great public highway between Louisiana and all of the States of the Union. The bridge over this eastern pass or mouth of East Pearl river (because it will be observed that it empties through a western pass into the principal channel or Lake Borgne at the Great Rigolets) has been built at an expense exceeding twenty thousand dollars. To destroy this bridge and construct another with a draw of sixty feet will cost more than double that sum; will expose to new perils the vast concourse of passengers traveling over the road, and partially obstruct the

rapid and safe transit of freight, the mail, and whatever is moved over the road.

In respect to the navigable waters of the United States this Court recognizes the authority of the United States as paramount to that of the States.

South Carolina *vs.* Georgia, 93 U. S., 4.
Pennsylvania *vs.* Belmont Bridge, 18 How., 421.
Clinton Bridge, 10 Wallace, 454.

The railroad company has a vested right in its bridge, and cannot be compelled to destroy it or allow it to be destroyed by others. We were forced to contest through the state courts until this court declared that they had no jurisdiction from the time our application for removal was filed, and now an effort is made to subject us to the dicta which were uttered (*coram non judice?*) when the courts had no jurisdiction, and was dealing with the cause now before the court.

The very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, and to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it is their duty to exercise an independent judgment in cases not foreclosed by previous adjudication.

Burgess *vs.* Seligman, 107 U. S., 20 (34, 35).
Carroll Co. *vs.* Smith, 111 U. S., 556 (562, 563).

We have caused the map attached to brief of complainant on file in this case to be photographed and attached it to this brief. Copies of the map of the Coast Survey in the record are also attached.

Referring to our original brief we, respectfully, ask that the judgment may be reversed, the mandamus rejected, and that complainant's bill may be dismissed.

GAYLORD B. CLARK,
THOS. L. BAYNE,
For Defendant in Error.